

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 4:05-cv-00329-JOE-SAJ</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA'S REPLY BRIEF IN  
SUPPORT OF ITS MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IN  
OPPOSITION TO PETERSON FARMS, INC.'S MOTION TO DISMISS  
AND ALTERNATIVE MOTION TO STAY THE PROCEEDINGS**

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits the following reply brief in further support of its Motion for Leave to File a Supplemental Brief in Opposition to Defendant Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay the Proceedings and to reply to new matter raised by Defendant Peterson Farms, Inc. ("Peterson Farms") in its responsive papers. Specifically, the State states as follows:

1. Contrary to Defendant Peterson Farms' assertions, there is no "right to have 'the last word'" with respect to a motion. Defendant Peterson Farms does not cite to a single authority for this novel proposition.

2. Contrary to Defendant Peterson Farms' assertions, the State's proposed supplemental brief is proper and not merely a "rehash" of previous arguments. Indeed, the proposed supplemental brief is made necessary by the repeated incorrect characterizations of

both the law and the allegations of the State by Defendant Peterson Farms in its reply brief.

Defendant Peterson Farms apparently believes that it has carte blanche in its reply brief to make such incorrect characterizations of the law and the State's positions. The supplemental brief, for instance, points out, without limitation, that:

a. The contention in Defendant Peterson Farms' reply that its conduct is at most a "legalized nuisance" not only misrepresents the applicable law which makes unlawful the pollution of Oklahoma's waters by poultry waste, but also ignores the allegations of the State's First Amended Complaint that Defendant Peterson Farms has violated these applicable laws.

b. Defendant Peterson Farms' reply ignores long-standing Supreme Court precedent that "[t]he cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus liability is commonly imposed under such circumstances for . . . maintenance of a nuisance . . .," *Young v. Masci*, 53 S.Ct. 599, 601 (1933) (citations omitted), when it states that the State's lawsuit violates Arkansas' sovereignty and Defendant Peterson Farms' due process rights.

c. Defendant Peterson Farms' reply ignores Tenth Circuit caselaw indicating otherwise when it asserts that the CWA pre-empts the State's Oklahoma-law based claims as to non-point source pollution emanating from Arkansas and causing injury to Oklahoma, and, in connection with this, Defendant Peterson Farms fails to understand the legal import of TMDLs and WQSs.

d. The contention in Defendant Peterson Farms' reply that the State believes the Arkansas River Basin Compact to be "merely a compilation of empty language, directing the respective states to disregard the Compact in favor of litigation over alleged interstate water pollution," mischaracterizes the State's position. Moreover, Defendant Peterson Farms'

contention in its reply that the Compact precludes Oklahoma from suing an interstate polluter unless Arkansas consents and joins is unsupported by the language of the Compact or logic.

e. The contention in Defendant Peterson Farms' reply that the State's nuisance *per se* claim is flawed relies upon a mischaracterization of the State's claims; the State's allegation is that it is Defendant Peterson Farms' poultry waste handling and disposal practices that cause pollution that are the nuisance *per se*.

f. The contention in Defendant Peterson Farms' reply that the action should be stayed ignores the legal and factual realities that parallel enforcement mechanisms have been created by statute, that the factual issues presented in this action are well within the competency of this Court to decide, and that there are no regulatory proceedings or orders which might conflict with the remedies being sought in this action.

3. Contrary to Defendant Peterson Farms' assertion, the State's Motion for Leave accurately recited that Defendant Peterson Farms objected to the relief being sought by the State. The State was under no obligation to recite a proposal advanced by Defendant Peterson Farms that the State had rejected, and that merely reflected Defendant Peterson Farms' unfounded belief that it was entitled to the "last word." Further, Defendant Peterson Farms' request to file its own supplemental brief, unlike the request of the State, is unsupported by any articulated need, other than to in fact have the "last word." Consequently, since Defendant Peterson Farms does not articulate any need for a response, the Court should conclude the State's supplemental brief creates no need for further clarification by Defendant Peterson Farms.

4. Allowing the State's supplemental brief to be filed is within the Court's discretion. *See* LCivR 7.1(h). The fundamental issue presented is whether the supplemental brief assists the Court in understanding and resolving the issues before it. The State respectfully

submits that its supplemental brief will assist the Court and should be permitted to be filed and considered.

WHEREFORE, the State moves this Court for an Order granting its Motion for Leave to File a Supplemental Brief in Opposition to Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay Proceedings.

Respectfully Submitted,

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December 20, 2005.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of December, 2005, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic filing to the following ECF registrants:

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